SUPREME COURT, U. S.

SEP 1 1967

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 565

HAROLD FRIEDMAN and JACK JOSEPH,
Petitioners,

vs.

LOUIS WALLACH, MOLLIE WALLACH, His Wife, RICHARD WALLACH, SHIRLEY KASH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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The Petitioners, Harold Friedman and Jack Joseph, respectfully request a Writ of Certiorari to Division No. 2 of The Supreme Court of Missouri to review a judgment of that court which affirmed, unanimously, a judgment of the Circuit Court of the County of St. Louis, setting aside on a theory of unjust enrichment a deed to real estate from Respondents conveying property to petitioners, wherein the Supreme Court applied the equitable theory of unjust enrichment in a case tried below on a fraud theory.

OPINIONS BELOW.

No formal opinion was rendered by the Circuit Court but its extensive findings and judgment both in the Interlocutory Decree (Record, p. 477 ff) and Final Decree (Record, p. 528) show the Chancellor's theory of the case. (This record was not printed in Missouri and a certified copy is filed here.)

The opinion of The Supreme Court of Missouri (Record, p. 537 ff), is printed as Appendix B herein, and it will be noted that the Petitioners promptly attacked that opinion in The Supreme Court of Missouri in their Motion for Rehearing and to Transfer to the Court En Banc (Record, p. 549 ff) and in paragraphs 4 and 11 of that Motion (Record, p. 555, Appendix C, pp. 22-29) petitioners first therein raised a Federal Question on which this petition is bottomed.

JURISDICTION.

The Judgment of The Supreme Court of Missouri sought to be reviewed was entered May 8th, 1967. A Motion for Rehearing or to Transfer to the Court en Banc was denied June 12th, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., 1257 (3).

THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether a Judgment of a State Supreme Court upsetting a Deed to Real Estate based on a purchase for a valuable consideration in good faith, upon a theory of unjust enrichment of the purchaser and without sufficient evidence, so endangers the stability of land titles as to constitute a taking of property without due process of law, and as to constitute a shock to public conscience, where the theory of the State Supreme Court was not

raised by the parties nor Court below nor briefed on appeal.

2. Whether title to real estate purchased in good faith is a title, privilege or immunity protected by Amendments V and XIV to the Constitution of the United States so that the taking thereof by a Court on a theory **dehors** the pleadings and briefs, is repugnant thereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitutional Provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States.

No Statutes are involved.

The pertinent part of said Fifth Amendment reads as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law."

The pertinent part of the said Fourteenth Amendment reads as follows:

> "Section 1. "* * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor * * *."

STATEMENT OF THE CASE.

Friedman purchased real estate in suburban St. Louis, Missouri, for $69,000.00 from Respondents, Louis Wallach and Mollie Wallach, his wife, putting title in the name of Petitioner Friedman's straw party, Petitioner Jack Joseph, and later on Louis Wallach and his Wife sued for recission on grounds of fraud; before trial, Louis Wallach got into trouble and conveyed the property to his

sister Shirley Kash and brother Richard Wallach, but we will state the facts as involving Harold Friedman and Louis Wallach, the primary moving parties. The conveyance from Louis Wallach to Friedman was drawn by Louis Wallach's attorney who was present at the title company when delivery of the deed was made, and had there been any fraud this lawyer would not have permitted the closing of the deal. Louis Wallach, it is true, was in financial straits and facing foreclosure, and it may be true that Friedman got a bargain; but the theory of unjust enrichment was not pleaded, proved or briefed in the Circuit Court of St. Louis County or in the Supreme Court of Missouri.

The Circuit Court set aside the Warranty Deed for failure of Friedman to finance an allegedly proposed partnership venture of Friedman and Wallach that Friedman had denied under oath in open court; there were no findings to support the element of fraud; and on appeal, the Supreme Court of Missouri failed to base its ruling on either partnership or fraud, but ruled that the conveyance unjustly enriched Friedman.

The testimony was voluminous, as were the briefs below, and we are printing those briefs as Appendices hereto, so that this Court may see by the process of elimination that **unjust enrichment** was not briefed below.

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The questions as to whether the Supreme Court of Missouri denied Petitioners due process of law by taking property from them in the manner it did, was raised in that Court by Motion for Rehearing as heretofore set out, that motion (see Appendix C, herein), reading in its paragraphs 4 and 11, as follows:

"4. This Court did not discuss the fact that the Court below undoubtedly erred in not declaring a mistrial on its own motion when defendants' exhibits disappeared from the court room during the trial. The action of the lower court in proceeding with a trial with knowledge that defendants' exhibits had disappeared under suspicious circumstances (to say the least!) denied appellants due process of law under Amendments V and XIV of the Constitution of the United States." (Record, p. 552; cf., Record, pp. 193, 379, 386.)

"11. The Due Process clauses of the Constitution of the United States were not pleaded below, but we feel very strongly that public policy forbids upsetting a warranty deed, given in good faith, both parties being represented by counsel when it was delivered. To upset such lightly would endanger the stability of all land titles. We urge most vehemently that the judgment of the court below and the opinion of this Court take Appellants' property without due process of law, in violation of Amendments V and XIV of said Constitution." (Record, p. 555.)

REASONS FOR ALLOWANCE OF THE WRIT.

The Record in this case (p. 558) shows that the Petitioners' Motion for Rehearing or to Transfer to the Court en Banc, was overruled. No opinion was filed at that time passing on the Federal question raised in that Motion. The law is well settled in this Court that where the record on appeal is silent as to a State Court's disposition of the Federal question raised, this Court will grant Certiorari and Reverse and Remand the case for such details; Villa v. VanSchaick, 299 U. S. 152, 57 S. Ct. 128, 81 L. Ed. 91; Patterson v. Alabama, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082; Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476, 57 S. Ct. 350, reversing 271 N. Y. 564, 3 N. E. 2d 186; and in Grannis v. Ordean, 234

U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 1363, it was held that where a Federal question is first raised in a Motion for Rehearing in a State Supreme Court, this Court can take jurisdiction on Certiorari.

The case in this Court closest to the case at bar is Postal Telegraph and Cable Co. v. City of Newport (1918), 38 S. Ct. 566, 247 U. S. 464, 62 L. Ed. 1215, reversing (1914), 169 S. W. 700, 160 Ky. 244, wherein it was held that where a State Court decides a question wholly on State law, the Supreme Court will review if Federal law is in anywise involved, and will reverse the case where the conclusion of the Court below "is so clearly unfounded that it cannot sustain the judgment"; and, further, that "The opportunity to be heard is an essential requisite of due process in judicial proceedings"; 247 U. S., l. c. 476; and a State may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard; loc. cit. 476; and we submit this doctrine makes it error for a Court on appeal to enforce a doctrine that was not pleaded, proved, briefed or argued below.

The Supreme Court of Missouri erred when it went outside the record to decide this case on a theory of unjust enrichment and wrote (Record, p. 546, this book, Appendix **B**, page 20),

> "We hold that, under the clear, cogent and convincing evidence in this case, the defendants, if permitted to retain title to or interest in the real estate, would be unjustly enriched, and that a constructive trust should be imposed in plaintiffs' favor. Restatement, Restitution, § 160; Musser v. General Realty Co., supra; Suhre v. Busch, 343 Mo. 679, 123 S. W. 2d 8; Swon v. Huddleston, Mo. Sup., 282 S. W. 2d 18, 25, 26."

We purposely refrain from discussing here the post-judgment writs of execution and other wrongs that will fall automatically when the case is herein reversed. There will be another way to have these things made right later. Not even an Act of Congress is Due Process of Law if it takes from a party a vested title to real estate, Chase v. U. S. (8 Cir., 1915), 222 Fed. 593, l. c. 596, 138 C. C. A. 117, and we fail to see how an off-beat Court Opinion abandoning the theories of both parties to the case could be any stronger. For this same reason we feel that this case is such a gross miscarriage of justice as not to be within the doctrine that ordinarily an adverse decision of a State Court, based on State law, litigated and contested, is not a denial of Due Process of Law; Worcester County Trust Co. v. Riley, 58 S. Ct. 185, 302 U. S. 292, 82 L. Ed. 268; Central Land Co. v. Laidley, 159 U. S. 103; Tracy v. Ginsburg, 205 U. S. 170, l. c. 178, last two sentences.

The exact proposition we raise has not been passed on by this Court and should be herein settled.

This case is not within the rule of McGarrity v. Delaware River Bridge Co., 292 U. S. 19, 78 L. Ed. 1095, 54 S. Ct. 565, where this Court had no copy of the record below. Missouri does not require the record to be printed and we are filing only one copy, but it is here.

The question we raise is substantial. Heretofore this Court has had many cases deciding whether or not particular State **statutes** violate the concept of "Due Process of Law," but we think this is a case never before decided in this Court, **whether or not an opinion of a State Supreme Court** is so diabolical in its approach to a case as to be a denial of due process of law. "Due Process" is usually thought of as synonymous with "Court Process" or "Court Trial". Bouvier defines it as "Law in its regular course of administration through courts of jus-

tice." We submit that regular course of administration contemplates an opportunity to present full evidence and briefs on every issue presented. If a State Supreme Court can, in a civil case, abandon a fraud theory and dispossess a landowner on some conception of "unjust enrichment," why could it not hold that evidence of rape being insufficient, some poor prisoner is guilty of automobile theft? If a Court can do what it did here, where must it stop? Is it not time for this Court to issue Certiorari here and in a hearing on the merits, determine once and for all how far an Appellate Court can go outside the pleadings and evidence in a lawsuit, dehors the briefs, and enter a star chamber judgment based on something as nebulous and non-existent as the fictional Kangaroo Courts of literature? We think jurisdiction should be accepted.

For the reasons outlined, it is submitted that the questions presented are substantial, and that this Petition for a Writ of Certiorari should be granted and that a plenary consideration of the issues is warranted.

Respectfully submitted,

DAVID K. BREED,
Attorney for Petitioners.

APPENDIX